IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-148

ARTHUR RANDALL SANDERS, JR.,
GULF COAST NEWS AGENCY INC., AND
TRANS WORLD AMERICAN, INC.,
A/K/A TWA, INC.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals For The Fifth Circuit on April 2, 1979, and Petition For Rehearing and Petition For Rehearing En Banc denied on June 15, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals For The Fifth Circuit is reported at 592 F.2d 788. The opinion of the denial of the Petition For Rehearing and Petition For Rehearing En Banc is reported at ____ F.2d ____. Both judgments are printed in Appendix A and B.

JURISDICTION

The decision of the United States Court of Appeals For The Fifth Circuit was entered on April 2, 1979. Timely application for petition for rehearing and petition for rehearing en banc was filed and denied on June 15, 1979.

The jurisdiction of the Court is invoked under Title 28, U.S. C 1257 (3).

QUESTIONS PRESENTED

I. Was there an illegal prior restraint when the Government kept 12 cartons containing 871 films for over two years without obtaining judicial approval?

II. Was the Government's acquisition of the films a seizure?

III. Was there an independent search when the FBI viewed the movies two months after receiving the movies?

IV. Does *U.S. v. Chadwick*, 433 U.S. 1 (1977) require a warrant to open and view the contents of the boxes?

V. Is it error to fail to inform the jury that children are not to be considered in determining community standards?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Arthur Sanders, Gulf Coast News Agency, Inc., and Trans World America, Inc., a/k/a TWA, Inc. were indicted and convicted for violation of 18 U.S.C. 371, for conspiring knowingly to use a common carrier to ship obscene materials interstate, in violation of 18 U.S.C. § 1462, and knowingly to transport obscene material interstate for the purpose of sale or distribution, in violation of 18 U.S.C. § 1465. Several pre-trial motions were filed and ruled upon by the court. A motion to suppress evidence and return property was filed and denied after a hearing. The court imposed a three (3) year sentence on Sanders and imposed a $10,000 fine on TWA, Inc. and a $33,000 fine on Gulf Coast News Agency, Inc.

The facts are fully set out in the Court of Appeals majority and dissenting opinions found in Appendix A.

Since the issues raised in this certiorari deal only with search and seizure, and a failure to affirmatively inform the jury that children are not part of the community in determining obscenity, a summary of how the FBI obtained possession of the obscene material will only be dealt with.

On Thursday, September 25, 1975, twelve (12) sealed boxes containing 871 8mm films of homosexual orientation

were shipped via Greyhound Package Express from St. Petersburg, Florida, to Atlanta, Georgia (R.T. Vol. 1 Supp. at 6). The Shipment, directed to "Leggs, Inc." on a "Will Call" basis, was reforwarded to a Greyhound substation contrary to Greyhound's usual practice of holding "Will Call" items for pick up—whereupon L'Eggs Products, INC. ("LPI") was contacted to pick up the package (R.T. Vol. 1 Supp. at 20-21, 33-35).

Michael Horton, Area Manager for LPI, drove to Greyhound to pick up the packages on Friday, September 26, 1975. Horton, accustomed to receiving only one or two boxes weighing but a few pounds, was surprised to see twelve unusually wrapped and reinforced boxes weighing hundreds of pounds. Since the boxes did not look "normal" to him, Horton pried one open and removed a box of film labeled "David's Boys." The box purported to describe its film contents. (The "David's Boys" series of films found in the shipped cartons consisted of 25 different titles of film of which 5 were charged in the Indictment.) Horton then replaced the box of film, advised an employee at the Greyhound terminus that the shipment did not belong to LPI and left. (R.T. Vol. 1 Supp. at 56, 59, 61, 76-77, 81-82, 99.)

When Horton returned to LPI he advised his Branch Manager William Fox about the shipment. Fox immediately went to the Greyhound terminus, examined a box of film from the already opened package and concluded that the 12 cartons were not the property of LPI. Fox did not pay the collect charges on the packages sinceLPI had no interest in them, but he took the shipment back to LPI nonetheless. (R.T. Vol. 1 Supp. at 119, 121, 129, 131; Vol. 7 at (C-146-47, C-150, C-178).

At LPI, Horton, Fox, Gregory Shults (LPI's Southern Regional Distribution Manager) and others opened all twelve cartons and examined the boxes containing the David's Boys films. Shults removed an 8mm film from its case and held it up to the light, but the frames of the film were too small to be observed in this fashion. Thereafter, Horton telephoned the FBI and informed Special Agent Lawrence Mandyck of what had happened. Mandyck instructed him to put the boxes in a safe place "where nobody can bother them" and that the FBI would pick them up. (R.T. Vol. Supp. at 63, 65, 90, 107, 133, 143-44, 171.)

Five days later on Wednesday, October 1, 1975, Agent Mandyck passed by LPI to pick up the 871 boxes containing film. Mandyck conceded that the box cover description of the films may have been incorrect and that he caused no application to be made for a search warrant during the five day hiatus although he easily could have obtained a warrant. At LPI the container cartons were arranged so that only the white tops of the boxes of film could be seen without removing the individual boxes from their container. Mandyck or another FBI agent opened a film box to attempt to see the reel of film therein. (The evidence reflects that each boxed reel of film was sealed by a piece of tape to keep it from unraveling. Accordingly, before a reel of film could be viewed, the tape had to first be removed.) (R.T. Vol. 1 Supp. at 93, 116, 134, 171, 192, 195, 206.)

On Friday, September 26, 1975, co-defendant Michael Grassi called from Atlanta to ask co-defendant Richard Larson in St. Petersburg, Florida what had delayed the expected shipment of films from Larson. Larson reported that the films had been shipped to the Atlanta warehouse

via Greyhound using the name "Leggs, Inc." as consignee—"Leggs" being the nickname of a female employee in the Atlanta warehouse. In the past, shipments had been made using the name "Leggs, Inc." That same day Larson contacted Greyhound express clerk Joe Harris in St. Petersburg to report the non-receipt of the shipment and to initiate a tracer on the package. He left a name and telephone number. (R.T. Vol. 1 Supp. at 13-14; Vol. 4 Supp. at 5-6; Vol. 7 at C-25, C-29-31.)

Gregory Shults of LPI attempted unsuccessfully to find out the consignor's address since it was fictitious. (Several witnesses explained that a fictitious name on shipment bills of lading was employed to prevent common carrier pilferage which occurred when the name of a known adult business was used.) Shults also spoke to Griffin Askew, Assistant Terminal Manager for Greyhound in Atlanta, to advise him that LPI was turning the shipment over to the FBI and he gave Askew the local FBI telephone number. (R.T. Vol. 1 Supp. at 31, 35-36, 50, 150, 167, 228-29; Vol. 4 Supp. 5-6.)

The defendants made numerous attempts to retrieve their misdelivered shipment. Ronald Bowman was sent to the Greyhound station in St. Petersburg on Monday, September 29, 1975 to look for the packages. A girl name Joyce telephonically contacted Griffin Askew at Greyhound on three occasions attempting to recover the shipment. Askew, however, had been advised by the FBI not to provide any information about the shipment and to call them if contacted about the twelve boxes. Askew complied with these directives. Defendant Grassi went to the Greyhound station personally three times looking for the package, leaving his name and number. He also contacted LPI on Tuesday, September 30, 1975, and several

times thereafter. LPI never admitted that they had the shipment. LPI's Fox apparently received two calls from someone trying to get the films back and specifically recalls speaking to Grassi but he believed their telephone conversation occurred about two weeks after LPI acquired the films. (R.T. Vol. 1 Supp. at 36, 50-52, 125; Vol. 4 Supp. at 6-10; Vol. 7 at C-30, C-138, C-147.)

Agent Mandyck did not review the films in the boxes he seized until December, 1975, even though he was aware the defendants were trying to get their merchandise back. It was not until February, 1976, that Mandyck through the filing of a report notified the United States Attorney's Office in Atlanta, Georgia, that he had the films in question. (R.T. Vol. 1 Supp. at 192, 193, 208; Vol. 7 at C-163.)

REASONS FOR GRANTING THE WRIT

I. The failure of the Government to seek judicial scrutiny after obtaining possession of a large amount of materials violates the rules set out in *Heller v. N.Y.*, 413 U.S. 483 and *A Quantity of Books v. Kansas*, 378 U.S. 205.

The Government took possession of the twelve (12) cartons of materials on October 1, 1975. Because the FBI did not apply to a magistrate for a warrant at any point, the only judicial determination was made at the trial on October 21, 1977 or over two years after the 871 films were taken out of circulation. This amounted to a classic prior restraint in violation of the first amendment.

The argument made by the government, and apparently adopted by the majority opinion, is that furtively distributed films raises no first amendment concerns at all. There is no basis in law for this rule.

This court has held that a prior adversary hearing must be held before a large quantity of expressive material is seized by the government for destruction. See *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961); *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

The FBI's acquisition of the films must be considered in light of first amendment interests. "The Fourth Amendment . . . must not be read in a vacuum." *Roaden v. Kentucky*, 413 U.S. 496 (1973).

The Eighth Circuit in *U.S. v. Kelly*, 529 F.2d 1365 (1976) has followed this approach and held that the FBI's acquisition was a "seizure" governed by the Fourth Amendment.

The FBI's actions presumptively blocked the distribution of presumptively protected materials, and in that circumstance, certain procedural safeguards must be met. *A Quantity of Books v. Kansas*, supra; *Heller v. N.Y.*, supra.

II. There is a conflict between the Fifth, Eighth and Ninth Circuits on whether the Government's acquisition of the materials from a third party constitutes a seizure requiring a warrant.

In Part III of Judge Wisdom's dissenting opinion (see Appendix A26) this issue is fully analyzed and discussed. In *U.S. v. Kelly*, supra, the court held that it was an additional search since the materials were presumptively protected by the First Amendment. In *U.S. v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) the court upheld the acquisition of the materials, but the FBI had immediately obtained a warrant to seize a shipment of books after it

accepted two copies of printed material in the private search.

In the present case, the warrantless seizure cannot be justified under existing exceptions to the warrant clause. The common carrier, or as in the case at bar, the employees of L'Eggs, had no authority to consent to the government's appropriation of the presumptively lawful contents of the cartons. The seizure cannot be justified under the plain view doctrine. See *U.S. v. Kelly*, 529 F.2d at 1372-73. Since no exigent circumstances necessitated immediate action, and the FBI had ample time to obtain a warrant, the search was unreasonable.

III. There is a conflict between the Fifth and Eighth Circuits on whether the screening of films received by the government from a third party is an independent search requiring a warrant.

In *U.S. v. Haes*, 551 F.2d 767 (8th Cir. 1977) the court held that the screening of films by the FBI was a search and a warrant was required in order for the government to review the movies. The only difference between *Haes* and the present case is that the employee's of L'Eggs may have had more to go on, but the question as to whether the films were obscene bears only on the issue of probable cause to search and seize the films; and that determination must be made by a neutral magistrate issuing a warrant. Also two months had expired between the time the FBI received the films and the screening. Therefore there was not one continuous search, and this delay would require the government to have obtained a warrant. Cf. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Finally in *U.S. v. Chadwick*, 433 U.S. 1 (1977) the court required law enforcement to obtain a warrant to

search a footlocker even if they has probable cause to believe the footlocker contained contraband. Petitioners fail to see any difference between a footlocker and boxes of films. Whether a container is large or small, the rule in *Chadwick* should apply, and the FBI was required to obtain a warrant.

IV. *Pinkus v. U.S.*, 436 U.S. 293 (1978) requires in a federal trial, that when requested, the court must inform the jury that children are not to be considered in determining community standards.

The district court told the jurors to judge the obscenity of the films by whether there "predominant appeal . . . viewed in (their) entirety, is to the prurient interest of the average person of the community as a whole . . ."

The court instructed the jurors that: "whether the predominant theme or purpose of the material is an appeal to the prurient interest of the average person of the community as a whole is a judgment which *must* be made in light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and an average interest in sex." Nowhere did the court undertake to inform the jurors that children or the very young are not to be considered.

Petitioners submitted several prospective timely jury instructions informing the jury that the average adult person is the test in applying contemporary community standards. (Vol. 1, exhibit 45, instruction no. 16, 18, 19, 21, 22, 23, 24, 27, 28, 29, and 54). They were all denied.

It is unfair to assume that the word "person" does not mean or include "children" or "very young people", or "teenagers".

In the questioning of prospective jurors prior to trial, juror Flanders stated:

"I have two teenage children coming up and they are faced with this type of thing on the streets every day. And it's . . . it's . . . to me very distasteful. And . . . (Volume 5, p. A-85)

Some if not all of the jurors may have felt that children or teenagers were part of the community standards and would view this type of material, and therefore would judge the materials as teenagers would view them.

If this Court permits a district judge, who is specifically reminded and requested to instruct the jury that the word "person" means "adult" by defense counsel, and denies this timely request, then the *Pinkus* doctrine is past history and has been in essence repudiated and buried.

District court judges all over this country would then be permitted to defeat the underpinning of *Pinkus*, by merely giving a general charge on community standards. No charge concerning restricting the jurors consideration of alleged obscene material by adults would be necessary. This is a constitutional rule that should be given in every obscenity prosecution.

CONCLUSION

This Petition for A Writ of Certiorari has attempted to present a brief description of the substantial issues presented and why this court should give plenary consideration to them. The lower federal courts are in direct conflict with each other as to the issues raised. Counsel acknowledges that Judge Wisdom's dissent (Appendix A20) eloquently and forcefully states the petitioners

position on four search and seizure issues raised in this certiorari petition.

Finally the per curiam opinion denying the petition for rehearing and petition for hearing en blanc (Appendix B1) holds that in cases where the Government "abridged the public's First Amendment right to access to" expressive matter the proper remedy would be the return of the allegedly obscene materials to the owner, with the Government retaining sample films for evidentiary purposes. Recently in *Lo-Ji Sales, Inc. v. N.Y.*, ____ U.S. ____, 25 CrL 3135 (June 11, 1979) this court reversed the denial of a motion to suppress the evidence where there has been an illegal general search and almost 1,000 items had been seized by the police. Since suppression was the proper remedy in *Lo-Ji* for causing a prior restraint, it would appear that the proper remedy would be suppression in the present case.

For the above reasons the Petition For Writ of Certiorari be granted, the judgment below be reversed.

Respectfully submitted,

/s/ GLENN ZELL

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CERTIFICATE OF SERVICE

I, GLENN ZELL certify that I duly mailed copies of the foregoing Petition For A Writ of Certiorari to W. Michael Mayock, 26th Floor, 10100 Santa Monica Blvd., Los Angeles, California 90067 and Donald B. Nicholson, Attorney, Department of Justice, Washington, D.C. 20530.

This _____ day of July, 1979.

_____

GLENN ZELL